United States Court of Appeals

for the Second Circuit

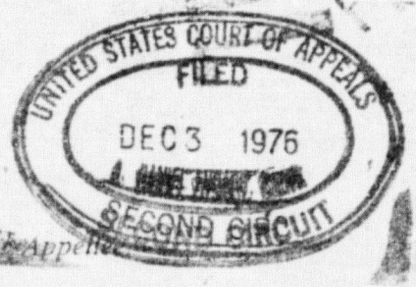
BRIEF FOR APPELLEE

76-7482

In The

United States Court of Appeals

For The Second Circuit



THE CORPORATE PRINTING, INC.,

Petitioner-Appellee,

vs.

NEW YORK TYPOGRAPHICAL UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION,

Respondent-Appellant.

BRIEF FOR PETITIONER-APPELLEE

WILLIAM G. O'DONNELL
Attorney for Petitioner-Appellee
509 Madison Avenue
New York, New York 10022
(212) 688-1010

(10196) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the Appellee in opposition to the appeal of the New York Typographical Union No. 6 from an order and judgment entered on August 18, 1976, by Judge Henry F. Werker of the United States District Court, Southern District of New York. The order and judgment, permanently restraining the Union from organizing the Appellee's managerial employees for the purpose

of representing them as part of the Union's bargaining unit, and from any activity which would compel the Appellee to recognize these employees as members of the Union.

ISSUE

The issue presented to the Court is whether certain supervisory managerial employees of The Corporate Printing Company, Inc., can be organized and become part of New York Typographical Union No. 6.

THE FACTS

The Corporate Printing Company, Inc., (hereinafter referred to as "Corporate") is a New York Corporation, with its principal offices located at 225 Varick Street, New York, New York. It is engaged in what is colloquially called "Financial Printing." The employees in issue perform customer service work. There are three such employees, two work the day shift and one the night shift. These employees deal with

clients either in person or by phone. They talk to customers on new jobs or jobs in process; receive copy from the customer and prepare the job for the plant, marking up copy. The customer service employees also designate and inform the foreman or the plant supervisor of the timing requirement of the job. They are responsible for telling the client the layout, how it should be set up, how the job will be performed, and are responsible for overall quality. These employees have the authority to direct the foreman on priorities in performance and schedules of the jobs, to determine whether overtime is required, to authorize foremen to assign overtime, and to rearrange production schedules. In addition, the customer service employees order outside purchases and have the authority to contract out work such as press, typesetting and bindery work, as may be necessary to fulfill customer requirements. The uncontroverted testimony at a prior hearing before the National Labor Relations Board established that these employees can bind the company to sums of money in excess of $50,000.00 per month for payment for such contracting of work. Further, they have the discretion to select the firms to which such work is sent without securing approval from any higher authority.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), a hearing

was held before Frank McCulloch, a Hearing Officer of the National Labor Relations Board (the "Board"). The Board determined that "the duties and authority of the three customer service men in issue establish them as managerial. Thus their advice and expertise are relied upon by the Employer in making major decisions with respect to expanding or decreasing the work force. They have the discretion on their own to contract out work and purchase supplies involving large sums of money, without authorization from superiors. They sometimes are in overall charge of the plant, dealing with the foremen in place of vice-president, and in general assist in running the company". (Appellant's Appendix p. 17) The Board subsequently concluded that the managerial employees of Corporate were not covered by the Act in accordance with the decision in N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, and therefore did not have the protections afforded by the Act.

On July 7, 1976, United States District Court Judge Henry F. Werker agreed with the factual conclusions reached by the Board. Judge Werker determined that "these managerial employees of the petitioner cannot be part of a bargaining unit represented by respondent because under the Act they are excluded from the protection of the Act with re-

spect to representation or bargaining." (Appellant's Appendix p. 28.)

It is from these adverse holdings that the respondent has appealed. Yet, the facts and circumstances involved herein have not changed. The petitioner asks that the decision of the lower court be affirmed.

POINT I.

THE EMPLOYEES AT ISSUE ARE NOT SUBJECT TO ORGANIZATION BY LOCAL NO. 6.

Whether the customer service employees of Corporate be characterized as either "supervisory" or "managerial", in any event they are excluded from coverage under the Act pursuant to 29 USCA Sections 152, 158 and 159, and thus not subject to organization by the New York Typographical Union No. 6.

Pursuant to 29 USCA §152, the only persons who may properly be included by the Board in the units it deems appropriate for collective bargaining purposes are "employees". Excluded from this employee category are supervisory and managerial personnel. There exists a very fine distinction beween "supervisory" and "managerial" characterization. "The term

'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees ... not of a merely routine or clerical nature but requires the use of independent judgment". 29 USCA §152 (11). "Possession of any one of the statutory powers relating to classification of employees as supervisor is sufficient to establish an employee's capacity as supervisor even though power is not customarily exercised." N.L.R.B. v. Metropolitan Life Insurance Co., 405 F.2d 1169, 1173 (1968). "Managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer." N.L.R.B. v. Bell Aerospace Company Division of Textron, Inc., 416 U.S. 267, 288 (1974).

Supervisors with the adoption of 29 USCA 164(a) have been granted the right to organized, however without the protection and rights of "employees". N.L.R.B. v. Edward G. Budd Mfg. Co., 169 F.2d 571 (1948). Recently in N.L.R.B. v. Bell Aerospace Company, supra, the Court held that all managerial employees, and not only those whose participation in a labor organization would create a conflict of interest with their job responsibilities, are excluded from the protections and rights afforded by the Act as amended. (29 USCA §151 et seq.)

In the instant case, the Board ruled the customer service employees of Corporate to be managerial. The reasoning employed by the Board is clear. The Union should be prohibited from organizing the customer service employees of Corporate whether they be characterized as either managerial or supervisory. In either case, the employees involved would be excluded from coverage by the Act. In the present situation members of the Union are not similarly excluded from the protection of the Act. By classifying the employees of Corporate as managerial, the Union would be precluded from organizing these employees because the Act's coverage would not extend to them as it would to other members of the organizing Union. Persons who fall within this classification of either supervisory or managerial are consequently not entitled to the protections accorded "employees" as stipulated in 29 USCA §164 and their employers are under no obligation to bargain collectively or include them in the Unit. N.L.R.B. v. Metropolitan Life Insurance Co., supra.

The respondent-appellant cites Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, 417 U.S. 790 (1974) as controlling. Judge Werker was correct in entitling that case inapposite. That case in-

volved the issue of whether a union commits an unfair labor practice under §8(b)(1)(B) of the Act when it disciplines supervisor-members for crossing a picket line during a lawful economic strike. In that factual circumstance, "rather than exercise its right to refuse to hire union members as supervisors, the company agreed to the inclusion of a union security clause in the collective bargaining agreement which required that these supervisors, like the rank-and-file employees maintain membership in Local 134." (Florida Power & Light, supra, at p. 792.)

Such a situation does not exist in the present case. The company has never elected to recognize the union as the exclusive bargaining representative of these managerial personnel or consented to their inclusion in the collective bargaining unit in issue. Parenthetically it should be noted that the Court in Florida Power & Light, supra, reminded the parties not to confuse §8(b)(1)(B) cases with issues involving the exclusion of coverage of certain personnel under 29 U.S.C. §152(3) and (11) of the Act. Congress enacted 29 U.S.C.

§164(a) to explicitly provide that:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

"Thus, while supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, see Carpenters District Council v. N.L.R.B., 107 U.S. App.D.C. 55, 274 F. 2d 564 (1959), the right to discharge such supervisors because of their involvement in union activities or union membership, see Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974), and the right to refuse to engage in collective bargaining with them, see L.A. Young Spring & Wire Corp. v. N.L.R.B., 82 U.S. App.D.C. 327, 163 F.2d 905 (1947), cert. denied, 333 U.S. 837 (1948)", Florida Power & Light, supra, at 808.

POINT II.

THE MANAGERIAL EMPLOYEES OF THE COMPANY ARE NOT COVERED BY THE CONTRACTUAL PROVISIONS OF ANY CONTRACT SECURED BY COLLECTIVE BARGAINING BETWEEN THE UNION AND THE COMPANY

Any argument that suggests managerial employees be subject to the arbitration provision of the existing collective bargaining agreement is erroneous. Such a suggestion would involve a gross misapplication of the intent of 29 USCA §164(a). In Beasley v. Food Fair of North Carolina, 416 U.S. 653, 662 (1974), the Court held,

> "We conclude, therefore, that the second clause of §14(a) relieving the employer of obligations under 'any law, either national or local, relating to collective bargaining' applies to any law that requires an employer to accord to the front line of management the anomalous status of employees."

Thus, any demand that the managerial employees be subject to the procedure outlined in paragraph 111 is precluded by law which prohibits their inclusion except upon the consent of the employer. That consent has never been granted by the employer. As Judge Werker concluded, after citing the case of Swift & Co., 115 N.L.R.B. 752 (1956), these managerial

employees cannot be deemed to be employees for the purposes of implementing paragraph 111 of the contract. (Appellant's Appendix p.29). Additionally, Judge Werker also concluded that the provisions of paragraph 111 do not become operative until the Union claims representation rights in a unit of employees not yet covered. By letter to the Court dated June 26, 1976, the Union expressly stated that it "has not sought and does not seek certification by the N.L.R.B." (Appellant's Appendix p. 29). Thus, the contract by its own terms does not obligate the employer to do what the Union requests.

POINT III.

THE BOARD'S FINDING THAT THE CUSTOMER SERVICE EMPLOYEES OF CORPORATE WERE MANAGERIAL IN NATURE IS ENTITLED TO GREAT WEIGHT IN ENJOINING THE UNION FROM ORGANIZATIONAL ACTIVITY

The fact that the Board has determined that the customer service employees are managerial is conclusive in ascertaining representational rights. While the Court is not under an absolute duty to uphold the Board's decision, such a holding with respect to a question of fact must be upheld if supported by substantial evidence on the record considered as a whole. Hackett Precision Co. v. N.L.R.B., 459 F.2d 463 (1972). In the present case, the evidence before the Board is conclusive.

There has been no change in circumstances in this case since Judge Werker and the N.L.R.B hearing officer determined the employees in issue to be managerial. Nothing in the record indicates that the Union now has any greater rights to the representational interests of the employees than at the time of denial by the Board.

CONCLUSION

THE JUDGMENT AND ORDER OF THE LOWER COURT SHOULD BE AFFIRMED AND THE UNION BE RESTRAINED FROM ATTEMPTING TO ORGANIZE MANAGERIAL PERSONNEL

The continuance of organizational activity by the Union is directly in contravention of all of the aforementioned decisions regarding the excludability of managerial personnel from Unions covered by the Act. There is no justification for this action in either case law or in the Union contract. By continuing to attempt organization of managerial employees, the Union's action eviscerates the traditional distinction between labor and management contrary to the holding in N.L.R.B. v. Bell Aerospace Co., supra. There has been no misinterpretation of law or change of facts to warrant reversal of the lower courts judgment. The Union cannot assert representational rights to managerial personnel who receive dissimilar protection of the Act than the other Union members.

Respectfully submitted,

William G. O'Donnell

William G. O'Donnell,
Attorney for
Petitioner-Appellee
509 Madison Avenue
New York, New York 10022

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE CORPORATE PRINTING, INC., Petitioner-Appellee, - against - NEW YORK TYPOGRAPHICAL UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, Respondent-Appellant.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 2nd *day of* December *19*76 *at* 51 Chambers St. New York, N.Y.

deponent served the annexed brief *upon* John J. Sheehan

the attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 2nd *day of* December *19*76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer
Reuben Shearer